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No. 77-768

In the

Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STATES OF AMERICA,
Respondent,

vs.

JOHN NEAL AND ROSA NEAL AND MINNESOTA MUTUAL LIFE INSURANCE COMPANY,
Respondents,

vs.

THE COUNTY OF COOK, a body politic and corporate, and SIDNEY R. OLSEN, Registrar of Titles,
Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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THE COUNTY OF COOK, a body politic and corporate, and SIDNEY R. OLSEN, Registrar of Titles,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioners respectfully pray that a Writ of Certiorari issue to review the order and unpublished opinion of the United States Court of Appeals for the Seventh Circuit entered August 25, 1977.

OPINION BELOW

The order and opinion of the Court of Appeals for the Seventh Circuit, entered August 25, 1977, affirming the decision of the United States District Court for the Northern District of Illinois, Eastern Division was issued in accordance with Circuit Rule 35, and accordingly, it will not be published. The opinion is set out in the Appendix.

JURISDICTION

The Court of Appeals rendered its decision in August 25, 1977. This Petition is filed within 90 days from August 25, 1977. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

Whether the notice of federal tax lien filed with the Recorder of Deeds for Cook County, Illinois on March 29, 1966, was in compliance with the mandate of Section 6323 of the Internal Revenue Code of 1954, thereby enabling the Government to enforce its lien against subsequent owners of the property?

Whether the decision of the Court of Appeals holding that both John and Rosa Neal and Minnesota Mutual Life Insurance Company are entitled to recover attorneys' fees from the Petitioners is in conflict with this Court's opinion in *Aleyska Pipeline Service Company* v. *Wilderness Society,* ..... U.S. ....., 95 S.Ct. 1612 (1975) when Illinois law did not mandate their right to such payment, and here was no contractual agreement with the Petitioners providing for such payment?

Whether a United States Court of Appeals may affirm a decision of a district court in an unpublished and uncitable opinion when the case is not controlled by direct precedent?

STATUTORY PROVISIONS INVOLVED

Section 6323 of the Internal Revenue Code of 1954, 26 U.S.C. §6323 (1954) provided in relevant part:

> "(f) Place for filing notice; form.—
>
> (1) Place for filing—The notice referred to in subsection (a) shall be filed—
>
> (A) Under State laws.—
>
> (i) Real property.—In the case of real property, in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated; and
>
> (ii) Personal property.—In the case of personal property, whether tangible or intangible, in one office within the State (or the County, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated; or
>
> (B) With clerk of district court.—In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State has not by law designated one office, which meets the requirements of subparagraph (A). . . ."

Rev. Proc. 67-15, CB 1967, page 592, provided:

> "In Cook County, Ill. there are two offices designated for filing notices of Federal tax lien in the case of real property. Because this requirement does not meet the provisions of section 6323 (f)(1)(A)(i) of the Internal Revenue Code of 1954, as added by the Federal Tax Lien Act of 1966, the Internal Revenue Service will file notices of Federal tax lien with

respect to such real property with the clerk of the U.S. District Court, Northern Judicial District, Eastern Division, Illinois.

"It has been brought to the attention of the Internal Revenue Service that the provisions of section 66 of chapter 82 of the Illinois Revised Statutes (1965) provide that notices of Federal tax lien with respect to real property are to be filed in the office of the recorder of deeds of the county in which the real property is located. However, if the real property is registered under the Torrens system of title registration, the notice of Federal tax lien is to be filed with the registrar of titles rather than the recorder of deeds. Accordingly, where the Torrens system is adopted by a county in Illinois, there are two offices designated for filing notices of Federal tax lien in the case of real property because one office is designated for Torrens real property and another is designated for non-Torrens real property."

"Cook County is the only county in Illinois to adopt the Torrens system of title registration.

"Section 6323 (f)(1)(A)(i) of the Internal Revenue Code of 1954, as added by the Federal Tax Lien Act of 1966, Public Law 89-719, C.B. 1966-2, 623, provides that in the case of real property, the Service shall file notice of Federal tax lien in one office within the State (or the county, or other governmental subdivision), as designated by the laws of such State, in which the property subject to the lien is situated.

"Because the requirements of section 6323 (f)(1)(A)(i) of the Code have not been met with respect to real property located in Cook County, Ill. the Service will file notices of Federal tax lien with respect to such real property with the clerk of the U.S. District Court, Northern Judicial District, Eastern Division, Illinois, in accordance with section 6323(f)(1)(B) of the Code. The Service considers the filing with the U.S. District Court in this case as the correct place for filing for determining the rights of the United States with respect to purchasers and applicable secured creditors. However, solely as a

matter of convenience and not as a matter of legal effectiveness, for those who may have occasion to search for notices of Federal tax lien, the Service will also attempt to file notices of Federal tax lien with the Recorder of Deeds, Cook County, Ill. Inasmuch as the U.S. District Court is the proper place for filing these tax liens, the records of the Recorder of Deeds for Cook County should not be relied upon as constituting the records of Federal tax liens against real property in Cook County.

"The Service will continue to file notices of Federal tax lien with respect to the personal property of taxpayers residing in Cook County, Ill. with the Recorder of Deeds, Cook County, Ill."

Illinois Revised Statutes 1965, chapter 30, Section 127 provided:

> "No statutory or other lien (including the liens of mechanics) shall be deemed to affect the title to registered land until after a memorial thereof is entered upon the register as herein provided. Where any statutory lien (including the liens of mechanics) is created by law without the necessity of filing or service of any notice or claims for liens in any court or office, or upon any person, firm, or corporation, an affidavit setting forth the existence of all facts necessary to create such lien shall be filed in the office of the registrar of titles by the lien claimant, and entered as a memorial upon the register of titles. Until such affidavit is so filed, and registered, no such lien shall be deemed to have been created."

Illinois Revised Statutes, 1967, ch. 30, §127, provided:

> "No statutory or other lien (including the liens of mechanics), except liens for internal revenue taxes, payable to the United States of America, shall affect the title to registered land until after a memorial thereof is entered upon the register as herein provided. Where any statutory lien (including the liens of mechanices) is created by law without the necessity

of filing or service of any notice or claim for lien in any court or office, or upon any person, firm, or corporation, an affidavit setting forth the existence of all facts necessary to create such lien shall be filed in the office of the registrar of titles by the lien claimant, and entered as a memorial upon the register of titles. Until such affidavit is so filed and registered, no such lien shall be created."

Illinois Revised Statutes (1965), Chapter 82, Section 66 provided:

"Where notices may be filed.] Notices of liens for internal revenue taxes payable to the United States of America and certificates discharging such liens may be filed in the office of the recorder of deeds of the county within which the property subject to the lien is situated, provided, however, that where the title to land to be affected by such notice of lien is registered under the provisions of an Act entitled, "An Act concerning land titles," approved and in force May 1, 17 7897, as subsequently amended, such notice of lien shall not be filed in the office of the recorder of deeds but shall be filed in the office of the registrar of titles as a memorial or charge upon each folium of the register of titles affected by such notice. Until such notice of lien is registered it shall not be valid as against any mortgagee, purchaser or judgment creditor having or claiming any right, title or interest in or to or lien against such registered property."

Illinois Revised Statutes, 1967, Chapter 82, Section 66 provided:

"Notices of liens for internal revenue taxes payable to the United States of America and certificates discharging, releasing, non-attaching and subordinating such liens and notice of revocation of such certificates shall be filed in the office of the recorder of deeds of the county within which the property subject to lien is situated."

STATEMENT OF FACTS

The primary defendant in this action, although she was not a party to this appeal, was Anne Davis, daughter of David J. Pleason. The Internal Revenue Service made assessments against Pleason for unpaid 1943 and 1944 federal income taxes, and those assessments were sustained in *Pleason* v. *Commissioner,* 22 T.C. 361 (1954), aff'd. 226 F. 2d 732 (7th Cir. 1955), cert. denied, 350 U.S. 1006 (1956). In 1959 Pleason transferred a shrimp boat to his daughter Anne Davis. Thereafter, in accordance with section 6901 of the Internal Revenue Service Code, the Internal Revenue Service served a statutory notice of deficiency upon Anne Davis, asserting a liability against her as a transferee of the assets of Pleason. Mrs. Davis duly filed a petition in the tax court, which on November 10, 1964, entered a decision finding that Anne Davis owed $16,905.92, plus interest, as a transferee.* *Davis* v. *Commissioner,* 23 T.C. Memo. 1449 (1964) No appeal was taken to the court of appeals. Therefore. in accordance with sections 6214 and 6215 of the Internal Revenue Code, the Internal Revenue Service made an assessment against Anne Davis in the amount of $16,905.92 plus interest of $6,155.61.

The realty involved herein, 7932 South Chappell Avenue, Chicago, Illinois, was conveyed to Anne Davis and Mary Ginsberg as tenants in common on August 9, 1943. On January 19, 1968, Davis and Ginsberg conveyed the realty to John and Rosa Neal. The Neals, on that same

* The facts underlying the transferee assessment as opposed to the Tax Court decision, may be found in the reported Tax Court opinion *Davis* v. *Commissioner,* T.C. Memo. 1964-244.

date, mortgaged the property to O'Brien and Pain, Inc., and O'Brien and Pain subsequently assigned its mortgage to Minnesota Mutual Life Insurance Company. At all times relevant the subject property was registered under the Torrens System of land registration. Ill Rev. Stat. 1967 ch. 30, §§45 *et seq.*

On March 29, 1966, the Internal Revenue Service filed a notice of tax lien against all property and rights of property of Anne Davis in the office of the Recorder of Deeds of Cook County. At that time section 127 of the Torrens Act, Ill. Rev. Stat. 1965, ch. 30, §127, provided that no lien would effect title to Torrens property unless and until a memorial thereof was filed with the Registrar of Titles and entered upon the Torrens Register.

In February, 1967, the Internal Revenue Service issued Rev. Proc. 67-15, CB 1967, page 592, which provided that in Cook County all federal tax lien notices seeking to effect real estate were to be filed with the Clerk of the United States District Court for the Northern District of Illinois, Eastern Division. Such a procedure was adopted because at that time, as well as prior thereto, Illinois law mandated that notices of federal tax lien were to be filed in the office of the recorder of deeds of the county in which the real property to be effected was situated, unless the realty involved was registered under the Torrens System of land registration, in which case the notice was to be filed with the Registrar of Titles. Ill. Rev. Stat. 1965, ch. 82, §66. Effective July 1, 1967, section 66 was amended to provide that all federal tax lien notices were to be filed with the recorder of deeds of the county in which the real property to be effected was situated. In accordance with the amendment of section 66, Rev. Proc. 67-15 was superseded by Rev. Proc. 68-1, CB 1968, page 741.

The United States Government brought this action to foreclose a federal tax lien against the real property located at 7932 South Chappell Avenue, Chicago, Illinois. The action was commenced by the Government on March 11, 1971, against Anne Davis. On April 30, 1971, the Government filed an Amended Complaint naming John and Rosa Neal and Minnesota Mutual Life Insurance Company as additional defendants. After cross-motions for summary judgment were filed, the Government's motion was granted in the amount of $23,061.53 by a memorandum opinion and order of the district court on November 3, 1972. The County of Cook and Sidney R. Olsen, Registrar of Deeds for Cook County, were then joined as third party defendants, and upon their motion the memorandum opinion and order of the district court was vacated on December 12, 1974. On March 8, 1974, the memorandum order and opinion was reinstated.

The defendants-third party plaintiffs, John and Rosa Neal and Minnesota Mutual Life Insurance Company moved for summary judgment against the County on February 4, 1976. Their motion was granted on April 7, 1976. On May 27, 1976, the County filed a motion to vacate that part of the summary judgment which allowed defendants-third party plaintiffs attorneys' fees and costs. Thereafter, in accordance with the district court's finding that the Neals and Minnesota Mutual were entitled to attorneys' fees and costs, a hearing was had on June 7, 1976. On August 6, 1976, the district court entered a judgment order in accordance with its previous findings, and on August 13, 1976, the County appealed from that judgment order.

The Court of Appeals affirmed the district court's decision in an unpublished and unciteable opinion on August 26, 1977. In its opinion the court held that the government's lien was valid and unfavorable even though it was filed with the wrong County official. In addition the court held both the Neals and Minnesota Mutual were entitled to recover attorneys' fees from the Petitioners. Petitioners now seek review of that decision in this court.

ARGUMENT

I.

THE DECISION OF THE COURT OF APPEALS GIVES FULL FORCE AND EFFECT TO AN INVALID TAX LIEN.

A. The Court Of Appeals Failed To Adequately Consider The Relationship Of The Parties And The Law As It Existed On March 29, 1966.

Affirming the district court's decisions allowing the Government summary judgment, the court of appeals concluded that when a state designated more than one office for the filing of a notice of federal tax lien, Section 6323 of the Internal Revenue Code of 1954 allowed the Government to file its notices of federal tax lien in any one of those offices. We submit that the court of appeal's conclusion is the result of its misconstruction of Section 6323 of the Internal Revenue Code as written on March 29, 1966, and its further misconstruction of the then applicable Illinois law.

The State of Illinois provides two methods for securing and protecting title to real estate within its boundaries. One system is the regular tract book system where documents effecting title are filed with the Recorder of Deeds of the county wherein the property is located. (Ill. Rev. Stat. 1965, ch. 30, §§1 et seq.) The other method is the Torrens system of land registration which requires the filing of any document effecting title with the Registrar of Titles of the county wherein the property is located. (Ill. Rev. Stat. 1965, ch. 30, §§45 et seq.) When filed with the Registrar the document is shown as a memorial against the property upon the certificate of title. Only documents which have been so registered are effective

as notice under the Torrens system. Property is initially placed in Torrens pursuant to a decree of the circuit court of the county where it is situated. (Ill. Rev. Stats., 1965, ch. 30, §§ 51-59). The court determines and decrees the interests of the various parties including lienholders, removes clouds on title, finds in whom title is vested, and what interests the property is subject to. (Ill. Rev. Stats., 1965, ch. 30, §§62-70). To be effective, all interests in the subject property must appear as memorials on the Certificate of Title issued by the Registrar of Titles. Cf. *People* v. *Mortenson,* 404 Ill. 107, 113 (1949).

The principal objective of the Torrens system of land registration is to provide an independent system of land registration whereby an intending purchaser of real estate can determine from the Torrens Register the condition of title. Cf. *Echols* v. *Olsen,* 63 Ill.2d 270, 275 (1976); *Miller* v. *Frederick's Brewing Company,* 405 Ill. 591, 594 (1950); *People* v. *Mortenson, supra* at 111 (1949); and *Hacken* v. *Isenberg,* 288 Ill. 589, 599-600 (1919). It is noteworthy that proceedings under the Torrens Act are statutory and the only way to give notice of one's rights in Torrens property is through compliance with the relevant provisions of the Act. Cf. *Hartsman* v. *Kaindl,* 411 Ill. 243, 250 (1948). The principal purpose in maintaining ". . . the Torrens system is to create a presumption that the certificate of registration in the Registrar's Office at all times speaks the last word as to the title thus doing away with secret liens and hidden equities. . . ." *Hacken* v. *Isenberg, supra,* at 599.

On March 29, 1966, the date the Government recorded its lien on the subject property with the Recorder of Deeds for Cook County, Section 6323 of the Internal Revenue

Code of 1954, 26 U.S.C. §6323 (1954), provided in relevant part:

> (a) Invalidity of lien without notice—Except as otherwise provided in subsection (c), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser or judgment creditor until notice thereof has been filed by the Secretary or his delegate.
>
> (1) Under State or Territorial laws.—In the office designated by the law of the State . . . whenever the State . . . has by law designated an office within the State . . . for filing of such notice. . . .

When Section 6323 is read together with the relevant Illinois law regarding methods of land registration, we suggest that the statutory scheme for filing notices of federal tax lien created by the Illinois General Assembly clearly was in compliance with the Code* as it then existed.

Analysis of the historical development of Section 6323 reveals that, as it read on March 29, 1966, it was not intended to require that states designate only one office for the filing of notices of federal tax lien. In 1954 Section 6323 was amended by Congress to make it clear that a notice of Federal Tax lien was valid notwithstanding the Government's failure to comply with the law of any state or territory regarding the content of a notice of lien. Importantly, neither the House of Representatives, nor the Senate gave any indication that Section 6323

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* On March 29, 1966, Illinois law provided that notices of federal tax lien were to be filed with the Recorder of Deeds *except* when the property to be effected was registered in the Torrens System of land registration (Ill. Rev. Stat. 1965, ch. 82, §66) In the case of Torrens property, the notices of lien were to be filed with the Registrar of Titles. (Ill. Rev. Stat. 1965, ch. 30, §127)

required the filing of such notices in only one state office. See H.R. Rep. No. 1337, 83rd Cong., 2nd Sess., A406-A407 (1954); and S. Rep. No. 1622, 83rd Cong., 2nd Sess., 575-576 (1954). It was not until the adoption of the Federal Tax Lien Act of 1966 that Congress placed any restriction upon the manner in which states were to designate offices for the filing of federal tax liens. See: S. Rep. No. 1708, 89th Cong., 2d Sess., 11 (1966); and *Hearings on H.R. 11256 and H.R. 11290 Before the House Comm. on Ways and Means,* 89th Cong., 2nd Sess., 45-46 (1966).

As we pointed out to the court of appeals, the purpose of Section 6323 is to prevent secret tax liens. We strongly suggest that the instant case involves exactly such a lien. The public, including the Neals, had the right to rely on the statutes involved. Here, the Neals and their mortgagee did exactly what was required by Illinois law. By deciding this case as it did, the court of appeals has mandated that more was required than that which was set out in the applicable statutes. Considering the intent of Section 6323, we find the court's decision that the Government may choose in which designated office to file a notice of federal tax lien when more than one such office exists amusing. In light of the lower court's decision, the Government could file all notices effecting Torrens property with the Recorder of Deeds, and all notices effecting property in the regular system of land recordation with the Registrar of Titles, and, thus, it could have legally created a secret lien system in Cook County.

We submit that the fallacy of the court of appeal's decision is readily apparent. Section 6323 provided that the notice of tax lien was to be filed in *the* office designated by state law, not *any* office designated by state law. When

so read it is clear that in 1966 Illinois designated the office for filing to be the office of the Registrar of Titles when the property effected was contained in the Torrens System of Land Registration. (Ill. Rev. Stat. 1965, ch. 30, §127) Moreover, the court's reliance upon case such as *United States* v. *Rasmuson,* 253 F.2d 944 (8th Cir. 1958) is clearly misplaced. *Rasmuson* is inapposite since it dealt with the question of a state's right to prescribe the form and content of notices of lien.

Accordingly, based upon the Government's failure to comply with the filing requirement contained in the Torrens Act, we submit the notice of tax lien was a nullity. For that reason the court of appeals erred when it affirmed the district court's decision holding that the lien was valid and enforceable.

B. The Government's Failure To File A Notice Of Tax Lien With The Clerk Of The United States District Court For The Northern District Of Illinois, Eastern Division, Defeated Any Lien Rights The Government May Have Had In The Subject Property.

We suggest that the Government, as well as the Court of Appeals, is bound by the position taken by the Internal Revenue Service prior to the enactment of the Federal Tax Lien Act of 1966. Until to the adoption of that Act, the Service took the position that a state could only designate one office for the filing of notices of tax liens. If a state designated more than one such office, the Service interpreted the multiple designation as though the state did not designate any office, and, therefore, filed notices of lien with the clerk of the appropriate Federal district court. See S. Rep. No. 1708, 89th Cong., 2nd Sess., p. 10.

Of equal importance is the statement by the House Committee on Ways and Means, to the effect that the filing requirements contained in Section 6323, as amended by the Federal Tax Lien Act of 1966, ". . . continued in effect the *rules* relating to the place for filing notices of Federal tax lien . . . which are contained in such sections (a) and (b) of Section 6323 of the present law." H.R. Rep. No. 1884, 89th Cong., 2d Sess., 47 (1966) (Emphasis Supplied). Clearly, the adoption of section 6323(f), 26 U.S.C. §6323(f) (1966), was an attempt by Congress to conform the notice requirements to the manner in which the Internal Revenue Service was at that time interpreting Section 6323.*

Assuming that the Government's interpretation of Section 6323 was correct, and that on March 29, 1966, Cook County provided more than one office for the filing of notices of tax lien, then the Government must be bound by its interpretation of the 1954 Code. Accordingly, the Government should have filed its notice of tax lien on the subject property with the Clerk of the Federal District Court for the Northern District of Illinois, Eastern Division. Failing to file with the Clerk of the Federal District Court, the Government was left with one alternative; filing with the Registrar of Titles in accordance with the mandate of the Torrens Act. Ill. Rev. Stat. 1965, ch. 30, §127. Since the Government failed to file either with the Clerk of the Federal District Court or with the Registrar of Titles, we submit that the Government had no enforceable lien right in the subject property. For that reason the

* It is clear that the Government did not interpret 26 U.S.C. §6323(f) (1966) as imposing any change in the manner in which they had been filing notices of tax lien prior to the adoption of the Federal Tax Lien Act of 1966. See Government's Memorandum below, A. 65.

court of appeals erred when it held that the Government's purported lien on the subject property was valid and enforceable, and affirmed the district court's summary judgment against the County of Cook and Sidney R. Olsen.

II.

THE DECISION OF THE COURT OF APPEALS ALLOWING THE NEALS AND MINNESOTA MUTUAL ATTORNEYS' FEES IS CONTRARY TO THE SPECIFIC MANDATE OF THIS COURT.

When the court of appeals affirmed the district court's award of attorneys' fees to the Neals and Minnesota Mutual, it specifically found that the Torrens Act specifically entitled them to such an award. That act provides only for the allowance of claims and damages sustained through any omission, mistake or misfeasance of the Registrar, or employee of the Registrar in the performance of their duties under the act. Ill. Rev. Stat. 1975, ch. 30, §§138 and 139. For that reason we submit that the appeals court erred when it held that the Torrens Act contemplated the payment of attorneys' fees.

In *Fleishmann Distilling Corporation* v. *Maier Brewing Company,* 386 U.S. 715 (1967) this Court held that attorney's fees were not an element of the damages suffered by a plaintiff in a trademark infringement case. After the scope of Fleishmann's trademark, and the fact of Maier's infringement were established, the district court awarded Fleishmann $60,000 in attorney's fees pursuant to section 35 of the Lanham Act, 15 U.S.C. §1117 (1962). Section 35 of the Lanham Act provided in relevant part:

> When a violation of any right of the registrant of a mark registered in the Patent Offices shall have been established in any civil action arising under this

> chapter, the plaintiff shall be entitled, subject to the provisions of sections 1111 and 1114 of this title, and subject to the principles of equity, to recover (1) defendant's profits, (2) any damages sustained by the plaintiff, and (3) the costs of the action.

On appeal the court of appeals reversed the district court, holding that under the Lanham Act federal courts were without power to make such awards. 359 F.2d 156 (9th Cir. 1966) Affirming the court of appeals, this Court stated:

> The rule here has long been that attorney's fees are not ordinarily recoverable in the absence of a statute or enforceable contract providing therefor. This Court first announced that rule in *Arcambel* v. *Wiseman,* 3 Dall. 306, 1 L. Ed. 613 (1796), and adhered to it in later decisions. See, e.g., *Hauenstein* v. *Lynham,* 100 U.S. 483, 25 L. Ed. 628 (1880); *Stewart* v. *Sonneborn,* 98 U.S. 187, 25 L. Ed. 116 (1879); *Oelrichs* v. *Spain,* 15 Wall. 211, 21 L. Ed. 43 (1872). In support of the American rule, it has been argued that since litigation is at best uncertain one should not be penalized for merely defending or prosecuting a lawsuit, and that the poor might be unjustly discouraged from instituting actions to vindicate their rights if the penalty for losing included the fees of the opponents' counsel. Cf. *Farmer* v. *Arabian American Oil Co.,* 379 U.S. 227 at 235, 85 S. Ct. 411, at 416, 13 L. Ed.2d 248 (1964); id., at 236-239, 85 S. Ct. 417-418 (concurring opinion of Mr. Justice Goldberg). Also, the time, expense, and difficulties of proof inherent in litigating the question of what constitutes reasonable attorney's fees would pose sustantial burdens for judicial administration. *Oelrichs* v. *Spain,* supra, 15 Wall. at 231. [386 U.S. at 717-718. Accord, *Alyeska Pipeline Service Company* v. *Wilderness Society,* ..... U.S. ....., S. Ct. 1612 (1975).]

Accordingly, since the Torrens Act did not specifically provide for the allowance of attorney's fees and costs, and since there was no express agreement regarding their payment, both the district court and the court of appeals erred when they ordered the County to pay the attorneys' fees and costs incurred by the Neals and Minnesota Mutual.

III.

THE PETITIONERS WERE PREJUDICED BY THE ISSUANCE OF AN "ORDER" THAT WAS, PURSUANT TO THE MANDATE OF CIRCUIT RULE 35, UNPUBLISHABLE AND UNCITABLE.

We suggest that Circuit Rule 35 removes from the judges the burden of careful and rigorous consideration which good decision making demands. This court hardly needs to be reminded of the great care which must be taken so that a justice may say that which needs to be said in exactly the right way, taking into account both precedent and the impact of the decision on future litigation. The high degree of care which is required guarantees the "rightness" of a judge's decision. In *N.L.R.B.* v. *Amalgamated Clothing Workers of America, AFL-CIO, Local 990,* 430 F.2d 966, 972 (5th Cir. 1970) the court noted:

> Opinions are to serve a number of purposes, at least two of which are highly significant. One is that an articulated discussion of the factors, legal, factual, or both, which lead the Court to one rather than to another result, gives strength to the system, and reduces, if not eliminates, the easy temptation or tendency to ill-considered or even arbitrary action by those having the awesome power of almost final review. The second, of course, is that the very discursive statement of these articulated reasons is the thing out of which law—and particularly judge-made law—grows. It is an essential

part of the process of the creation of principles on which predictions can fairly be forecast as a basis for conduct, accountability, or the like. . . .*

We suggest that Rule 35 leads away from the rigors of thoughtful analysis and application of law and fact. To that extent, the Rule undermines the "rightness" of the judges' decision-making.

In testimony before the Commission on Revision of the Federal Court Appellate System, Judge Sprecher stated:

> It takes about 50 per cent of a judge's time to prepare opinions and to read other judges' opinions. If a substantial portion of that time can be conserved by a judge knowing in advance that he (sic) dealing with a non-precedential case, if he can eliminate writing and researching most or all of the facts, which are known to the parties in any event, and if *he can eliminate the difficult process of weighing the facts and*

* See also: Liflar, "Some Observations Concerning Judicial Opinions," 61 Colum. L. Rev. 810, at 810 (1961) where the author states:

> [T]he necessity for preparing a formal opinion assures some measure of thoughtful review of the facts in a case and of the laws' bearing upon them. Snap judgments and lazy preferences for armchair theorizing as against library research and time-consuming cerebral effort are somewhat minimized. The checking of holdings in cases cited, the setting down of reasons in a context of comparison with competing reasons, the answering of arguments seriously urged, the announcement of a conclusion that purportedly follows from the analysis set out in the opinion, are antidotes to casualness and carelessness in decision. They compel thought. It is even necessary that the thought have some of the quality of rigorousness in it. This does not assure that any particular opinion will be a good one, but it does increase the likelihood that it will be fairly good. That is a genuine function of judicial opinion, everyone will agree.

> *applicable law which is essential to a precedent-setting case but not otherwise,* he can eliminate the need also for the kind of blending of legal developments from the past to the present that are necessary to develop a precedent, and he can save a tremendous amount of this 50 percent of the case time. . . . [Commission on the Revision of the Federal Court Appellate System, Hearings—Second Phase 1974-1975, Vol. I, 1974 Hearings, Testimony of Honorable Robert Sprecher, Judge, Seventh Circuit Court of Appeals, at 530. (Emphasis Supplied).]

The elimination of the "difficult process of weighing the facts and applicable law" clearly leads to the derrogation of the "rightness" of a judicial decision. That process is the heart of decision-making. As the court noted in *United States* v. *Forness,* 125 F.2d 928, 942-943 (2nd Cir. 1942), cert. denied, 316 U.S. 694 (1942):

> An impeccably "right" legal rule applied to the "wrong" facts yields a decision which is as faulty as one which results from the application of the "wrong" legal rule to the "right" facts. . . . [A]s every judge knows, to set down in precise words the facts as he finds them is the best way to avoid carelessness in the discharge of that duty: Often a strong impression that . . . the facts are thus-and-so gives way when it comes to expressing that impression on paper. . . .

We suggest that Rule 35 enabled the appeals court to rule as it did because it provided that court with the knowledge that its opinion could not be cited as precedent in subsequent cases. That being the case, the court was able to conclude, for instance, that attorney's fees were an element of damages despite this court's previous decision to the contrary. Had the lower court's "order" been published as an "opinion," we feel a different result may have been obtained.

CONCLUSION

For the reasons stated, Petitioners respectfully pray that a Writ of Certiorari issue to the Court of Appeals of the Seventh Circuit to review its unpublished decision; that the decision be reversed and it be ordered to remand the case to the district court with directions that judgment be entered in Petitioners' favor.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

Heard January 20, 1977

Decided August 25, 1977

Before

Hon. THOMAS E. FAIRCHILD, Circuit Judge

Hon. WILBUR F. PELL, Circuit Judge

Hon. JAMES L. FOREMAN, District Judge*

UNITED STATES OF AMERICA, *Plaintiff-Appellee,* *vs.* JOHN NEAL, ROSA L. NEAL and MINNESOTA MUTUAL LIFE INSURANCE COMPANY, *Defendants-Third Party Plaintiffs-Appellees,* *vs.* THE COUNTY OF COOK, a Body Politic and Corporate, and SIDNEY R. OLSEN, Registrar of Titles, Cook County, Illinois, *Third Party Defendants-Appellants.*	Appeal from the United States District Court, Northern District of Illinois, Eastern Division No. 71-C-617 FRANK J McGARR, *Judge* No. 76-1752 No. 76-1915

ORDER

Third party defendants-appellants, Cook County and Sidney R. Olsen, Registrar of Titles for Cook County, appeal the district court's granting of motions for summary judgment in favor of plaintiff, the United States and defendants-third party plaintiffs, John and Rosa Neal and Minnesota Mutual Life Insurance Company.

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* Honorable James L. Foreman, United States District Judge for the Eastern District of Illinois, is sitting by designation.

Two issues are raised on appeal. The first issue is whether the notice of a federal tax lien filed on March 29, 1966 with the Cook County Recorder of Deeds was effective against subsequent purchasers and mortgagees of the taxpayers property. The second issue is whether the trial court's award of attorneys' fees to the third-party-plaintiffs was proper. For the reasons stated in this order, the answer to these questions is yes and the judgment appealed from is affirmed.

The facts are uncontested. The United States Tax Court found that Anne Davis owed to the United States Government taxes in the amount of $16,905.92 as a transferee of assets pursuant to Int. Rev. Code of 1954, §6901. See *Davis* v. *Commissioner,* 23 T.C. Memo 1449 (1964). In accordance with that decision, on March 29, 1966, the Internal Revenue Service filed in the office of the Recorder of Deeds of Cook County, Illinois, a notice of a federal tax lien against all the property of Anne Davis. This notice was refiled in the same office on March 10, 1971. See Int. Rev. Code of 1954, §6323(g).

The real estate in question, located at 7932 South Chappell Avenue, Chicago, Illinois, was registered under the Torrens Act of 1897,[1] Ill. Rev. Stat., Ch. 30, §45 prior to

[1] "The Torrens Act, Ill. Rev. Stat., Ch. 30, §§ 45-148 (1961) is designed to establish a system of registration of land ownership whereby an interested party can ascertain from the register the condition of the title and have notice of the interests therein. To register, an owner of land makes application to a court having chancery jurisdiction, setting forth ownership, his estate or interest in it, the occupants of the land, the holders of liens, and whether any other persons have any claims or interests therein. Following publication, notice and adjudication of any adverse claims, a certificate of title is made and entered in a Registrar of Titles kept by the Registrar. A duplicate certificate of title is then given to the owner, who must in person sign a receipt which is kept as evidence of his handwriting and is prima facie proof of the genuineness of his signature. (§§80-81.) Thereafter, the transfer of any interest in said land is registered by filing the conveying instrument and the owner's duplicate certificate of title with the Registrar. (§91.)" *Hoffman* v. *Schroeder,* 38 Ill. App.2d 20, 186 N.E.2d 381, 384 fn. 1 (1962).

the filing of the tax lien. On December 1, 1967, after the filing of the tax lien, Anne Davis conveyed her share of the real estate to John Neal and Rosa Neal. Minnesota Mutual Life Insurance Company obtained an assignment of the mortgage incurred by the Neals as a result of the transfer.

Int. Rev. Code of 1954, §6323, in effect in March 1966, provided that notices of federal tax liens were to be filed in the office designated by the law of the State in which the property was located, but, when the State had not designated an office, notices were tc be filed with the clerk of the district court.[2] Ill. Rev. Stat., 1965, Ch. 82, §66, in conformity with the federal statute, stated that federal tax liens were to be filed in the office of the recorder of deeds for the county in which the real property was situated. But, if the realty involved was registered under the Torrens System of land registration, then the notice was

[2] Internal Revenue Code of 1954 (26 U.S.C. 1964 ed.):
Sec. 6323 [as amended by Sec. 236(c)(1), Revenue Act of 1964, P.L. 88-272, 78 Stat. 19]. VALIDITY AGAINST MORTGAGEES, PLEDGEES, PURCHASERS, AND JUDGMENT CREDITORS.

(a) *Invalidity of Lien without Notice.* Except as otherwise provided in subsection (c) and (d), the lien imposed by section 6321 shall not be valid as against any mortgagee, pledgee, purchaser, or judgment creditor until notice thereof has been filed by the Secretary or his delegate

(1) *Under state or territorial laws.* In the office designated by the law of the State or Territory in which the property subject to the lien is situated, whenever the State or Territory has by law designated an office within the State or Territory for the filing of such notice; or

(2) *With clerk of district court.* In the office of the clerk of the United States district court for the judicial district in which the property subject to the lien is situated, whenever the State or Territory has not by law designated an office within the State or Territory for the filing of such notice;

• • •

to be filed with the Registrar of Titles.[3] Illinois law further provided that no lien would affect the title to Torrens property until a memorial thereof was filed with the Registrar of Titles and entered upon the Torrens Register. Torrens Act of 1897, Ill. Rev. Stat. 1965, Ch. 30 §129. Effective June 23, 1967, Illinois amended its law to provide for the filing of all federal tax lien notices in the office of the recorder of deeds regardless of whether the property was registered under the Torrens System. Ill. Rev. Stat. 1975, Ch. 82, §66.

The present action was brought by the United States to foreclose a tax lien. The District court granted a motion for summary judgment on November 3, 1972, in favor of the United States because, the court reasoned, the 1967 changes in the Illinois law only guaranteed title to Torrens Act property subject to the possibility of an outstanding federal tax lien. Therefore, a purchaser after June 23, 1967, should have checked with the office of the Cook County Recorder of Deeds to insure that a federal tax lien did not exist against the property which he intended to purchase. The district court reasoned that the 1967

[3] Ill. Rev. Stat., Ch. 82, §66.

Notices of liens for internal revenue taxes payable to the United States of America . . . may be filed in the office of the recorder of deeds of the county within which the property subject to the lien is situated, provided, however, that where the title to land to be affected by such notice of lien is registered under the provisions of an Act entitled, "An Act concerning land titles," approved and in force May 1, 1897, as subsequently amended, such notice of lien shall not be filed in the office of the recorder of deeds but shall be filed in the office of the registrar of titles of the county wtihin which the property subject to the lien is situated and shall be entered upon the register of titles as a memorial or charge upon each folium of the register of titles affected by such notice. Until such notice of lien is registered it shall not be valid as against any mortgagee, purchaser or judgment creditor having or claiming any right, title or interest in or to or lien against such registered property.

law was in effect when the Neals purchased their property and they took subject to this lien.

In February of 1973, the Neals, purchasers, obtained leave of court and filed a third-party complaint against Cook County and the Registrar of Titles for indemnification. The Court vacated its original order, granting summary judgment to the United States, but after reconsideration the Court reinstated its order on March 8, 1974. On April 7, 1976, the Court entered a judgment of foreclosure in favor of the United States and granted the motion of the purchasers for summary judgment for indemnification against Cook County and the Registrar of Titles.

On May 27, 1976 Cook County and the Registrar filed a motion to vacate that part of the Court's order of summary judgment which granted attorneys' fees and costs. On June 7, 1976, John Neal, Rosa Neal, and Minnesota Mutual Life Insurance Company were allowed attorneys fees and costs. Final judgment was entered on August 6, 1976[4] and notice of appeal was filed on August 13, 1976.

Cook County and the Registrar argue on appeal that the notice filed by the government in 1966 did not comply with Int. Rev. Code of 1954, §6323 and the applicable Illinois law at the time it was filed and that the government's lien is therefore a nullity. The County contends that the only proper filing places for a lien against Torrens property under §6323 in 1966 were the Registrar of Titles' Office or the Clerk's Office of the United States District Court for the Northern District of Illinois[5] and that contrary to the district court's order, the subsequent amendments to Illinois law could not validate an invalid lien.

A policy argument is also advanced in favor of the County's position. In order to comply with the additional duties as a result of the 1967 amendments to Illinois law, the Registrar of Titles for the County of Cook established

[4] The August 6, 1976 judgment in the record is unsigned.

[5] See Rev.Proc. 67-15, CB 1967, p. 592.

an indexing system for all post June 23, 1967, federal tax lien filings. The County argues that if the Registrar is held responsible for filings made prior to the change in law, the County will be forced to conduct title searches on all property which is subject to notices of tax liens to determine which is Torrens property. However, hardship arising from these laws and the attendant indexing problem is not relevant to the instant inquiry. The question here is solely one of statutory interpretation.

Turning now to the merits of the appeal, the government has taken the position, with which the Court agrees, that pursuant to Internal Revenue Code of 1954, §6323, a state may designate only one office for the filing of federal tax liens against real estate. The language in effect in 1966, at the time the government filed its tax lien notice spoke in terms of "[i]n the office designated . . . whenever the State or Territory has by law designated an office. . .".[6]

The legislative history and case law of that period indicate a congressional intent to avoid the harsh results of secret liens upon innocent purchasers yet to limit the burden on the government of having to comply with diverse or complicated state creditor laws. *United States* v. *Hodes*, 355 F.2d 746 (2nd Cir. 1966). Cert. granted 384 U.S. 968 (1966), reh. den. 386 U.S. 901 (1967). See also *United States* v. *Snyder*, 149 U.S. 210 (1893), *United States* v. *Estate of Donnelly*, 397 U.S. 286 (1970), *United States* v. *Rasmuson*, 253 F.2d 944 (8th Cir. 1958). Congress did not intend to require the government to engage in extensive factual investigations to determine the proper place for filing each lien. Moreover, as has been noted in other cases, States do not have the power to legislate with regard to federal tax liens except on authority granted by Congress and any provisions granting such authority must be narrowly construed. *Union Planters National Bank* v. *Godwin*, 140 F.Supp. 528 (E.D. Ark., W.D. 1956).

The language of section 6323 has been amended several times since its original enactment to overcome problems

[6] Supra f.n. 2.

of its interpretation. An earlier form of this provision provided for filing to be "in accordance with the law of State". See Revenue Act of 1928 C. 852, 45 Stat. 791, Section 613(a). This language was found to be unsatisfactory and amended in 1942 by striking the phrase "in accordance with the law of the state" and substituting "[i]n the office in which the filing of such notice is authorized." Section 3672 of the 1939 Code as amended by Section 505, Revenue Act of 1942 C. 619, 56 Stat. 957. In 1964, the provision was amended again to provide for filing "[i]n the office designated by law . . . whenever the state . . . has designated an office." Finally, in 1967 Congress clarified the language of the statute by substituting the words "one office" for "the office", thereby making explicit the previously implicit Congressional intent to permit the states to choose one filing place. The Committee on Finance when considering this latter amendment termed it an amendment "designed to clarifying [sic] existing law". 1966 U.S. Code Cong. and Admin. News p. 3722 at 3731.

Concluding as we do that a state may only designate one office for the filing of federal tax liens, the next question is whether Illinois designated "an office" within the meaning of section 6323. If Illinois had not designated "an office", the only proper filing place would have been the office of the Clerk, United States District Court. See Int. Rev. Code of 1954, §6323(a)(2) 1964 ed.

The applicable Illinois statutory language at the time the federal tax lien was filed in March 1966, provided that notices of liens were to be filed in the office of the recorder of deeds, but that liens filed against Torrens property were to be filed not with the recorder of deeds but with the registrar of titles. Illinois thus designated "an office" for the filing of real estate tax liens with an alternate office to be used for a specific type of property.

In *United States* v. *Rasmuson*, *supra*, Minnesota law designated the registrar of deeds as the place for filing liens. In addition a description of the real estate was

required to be filed under state law where Torrens land was involved. The Court rejected the State's argument that the government's lien against Torrens property was invalid without the proper description being filed. It found that Minnesota had designated the place of filing as the register of deeds and that the further prescription concerning Torrens land had no effect. The invalid additional provision requiring descriptions for Torrens land did not invalidate the designation of the office. Further, the provision requiring the United States to file its lien notice with the district court clerk did not come into operation.

Applying the reasoning of the court in *Rasmuson, supra*, to this situation, we find that Illinois had designated, one office, the Recorder of Deeds, for the filing of liens. Any further provision concerning Torrens land was unauthorized and had no effect. The Torrens provisions did not invalidate Illinois law or set into operation the alternative federal provision requiring the government to file in federal court. Therefore, the government's filing of this notice of lien in the County of Cook's Recorder of Deeds' Office established its priority over subsequent purchasers and mortgagees.

The second question presented by this appeal concerns the awarding of attorneys fees to the purchasers and mortgagee. Cook County and the Registrar contend that the district court erred when it ordered reimbursement of attorneys' fees. They argue that pursuant to *Fleischmann Distilling Corp.* v. *Maier Brewing Company,* 386 U.S. 714 (1967) and *Alyeska Pipeline Service Company* v. *Wilderness Society,* 421 U.S 240 (1975) attorneys fees are not recoverable in the absence of a statute or enforceable contract.

The issue is whether Ill. Rev. Stat. Ch. 30, §138 authorizes an award of attorneys fees when it provides that:

> "Any person sustaining loss or damage through any omission, mistake or misfeasance of the registrar, or of any examiner of titles, or of any deputy or

> clerk of the registrar in the performance of their respective duties under the provisions of this act, and any persons wrongfully deprived of any land or any interest therein, through the bringing of the same under the provisions of this act, or by the registration of any other person as owner of such land, or by any mistake, omission or misdescription in any certificate, or in any entry or memorandum in the register book, or by any cancellation, and who by the provisions of this act is barred or in any way precluded from bringing an action for the recovery of such land or interest therein, or claim upon the same, shall have a right of action for the damages thus sustained against the county in which such land shall be registered, and may file a claim with the county board, or bring an action at law against the county in which said land is situated for the recovery of such damages. [As amended by act approved May 24, 1907. L. 1907, p. 207.]"

It is the Court's opinion that the "damages" allowed in section 138 should be construed in conjunction with the other provisions of the act.

The explicit intent of the Torrens Act is to comprehensively protect the purchaser of property registered under the system. The whole tenor of the Act is that one who takes from a registered owner holds his interest with assurance that his title will not be defeated by defects in the certificate of registration. See *Hoffman* v. *Schroeder,* 38 Ill. App.2d 20, 186 N.E.3d 381 (1963).

Sections 130 and 131 of the Torrens Act provide jurisdiction for suits by "aggrieved" parties against the registrar of titles for losses incurred. Section 139 creates an indemnity fund for the satisfaction of any such judgments and claims. Section 133 defines "damages" in cases contemplated in sections 130 and 131 as including "reasonable attorneys fees". Finally, section 147 sets out an explicit mandate that the act "shall be construed liberally so far as may be necessary for the purpose of effecting its general intent."

Finding as we do that the general and explicit intent of the Torrens Act in Illinois is to protect innocent purchasers, we hold that the damage provision of section 138 includes reasonable attorneys fees. We base this decision upon a liberal construction of the act and the specific inclusion of attorney's fees as an element of damages in Ill. Rev. Stat. Ch. 30, Sec. 133.

Accordingly the judgment of the District Court granting motions for summary judgment in favor of plaintiff, the United States and defendants-third party plaintiffs, John and Rosa Neal and Minnesota Mutual Life Insurance Company, and awarding costs including reasonable attorneys fees to the defendants-third party plaintiffs is affirmed.

JUDGMENT AFFIRMED.